APPENDIX

(from a Brief filed by the State of California, dated July 31, 1951)

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 6, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

THE STATE OF CALIFORNIA

BRIEF IN RELATION TO REPORT OF SPECIAL MASTER OF MAY 22, 1951

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B. Even Assuming Solely for the Purposes of Argument That 1850 Conditions Must Be Considered in Determining the Boundaries of the Marginal Belt, Accretions on the California Shore Line Formed by Slow and Imperceptible Degrees but Caused by Man-Made Structures Should Not Be Included in the Marginal Sea.

The second preliminary question is raised by Plaintiff's assertion that the Court must decide "whether the California rule that accretions artificially induced do not accrue to the adjoining landowner or the Federal rule that such accretions do accrue to the owner of adjoining land is to be applied." (Master's Report, p. 30) As shown above, it is the position of California that the marginal sea does not include any of the shore-line area which is not presently submerged and that the boundaries of the marginal sea must be determined on the basis of present conditions in the shore-line area. Consequently, California believes that there is no occasion for choosing between the Federal and California rules on accretions.

Assuming, however, solely for the purposes of argument that the marginal sea does extend to land which is not presently submerged, California believes that the Court should adopt the federal rule that accretions formed by gradual and imperceptible degrees even though induced by artificial structures accrue to the owner of the adjoining land.

The basis of the federal rule is the common law principle that natural accretions belong to the riparian or upland owner, while artificial accretions do not. Under the federal rule, accretions formed by slow and imperceptible degrees are held to be natural and not artificial even though the impelling cause is the erection of some artificial structure or some other work of man. *County of St. Clair* v. *Lovingston*, 23 Wall. 46, 66-69. The federal view that such accretions are natural and not artificial reflects the English common law rule to that effect. *Brighton and*

Hove Gen- [91] *eral Gas Co.* v. *Hove Bungalows Ltd.* (1924), 1 Ch. 372, 381, 383-390, *Doe* v. *East India Company* (1856), 10 Moore P.C.C. 140, 14 Eng. Reprint 445. States other than California have generally taken the same view as the federal courts. See e.g., *Burke* v. *Commonwealth* (Mass. 1933), 186 N.E. 277, 279; *Hanson* v. *Thorton* (Ore. 1919), 179 Pac. 494, 496; *Tatum* v. *City of St. Louis* (Mo. 1894), 28 S.W. 1002, 1003.

California courts have carved out a narrow exception to this view of the federal courts, the English common law, and the majority of American state courts. In the special circumstances where there is a controversy between an upland owner and the State of California or its grantee, it is held that accretions formed by gradual and imperceptible degrees but indirectly caused by a man-made structure are "artificial" and hence do not belong to the upland or riparian owner. *Carpenter* v. *City of Santa Monica*, 63 Cal. App. 2d. 722 (1944).

There are ample reasons why this exceptional California view should not be extended and applied in determining the boundaries of the marginal sea off California. As pointed out above, the California rule is contrary to that adopted by the courts of most other states. Consequently, if state law is to be applied in determining the boundaries of the marginal sea, there would be a different result in different states. In view of the international importance of a nation's policy with regard to the width of this belt, it would seem especially undesirable for the United States not to have a consistent policy concerning its boundaries. Since the limits of the marginal sea are a national problem arising all along this country's ocean boundary, the application of the uniform federal rule would seem preferable.

Moreover, the considerations in this proceeding between California and the United States concerning the limits of the marginal sea are substantially different from those involved in the controversy between the State and an upland owner in the case where the exceptional Cali-

fornia rule was [92] enunciated. The California rule was adopted to enable municipalities to improve their harbor areas without having to condemn the accreted areas and to protect the interest of California citizens in the tidelands (held in trust for them by the State). *Carpenter* v. *City of Santa Monica*, 63 C. A. 2d at 794. Application of the California exception in the present proceedings would not serve the purposes for which it was created. Here, the California rule would be destructive, rather than protective, of the interests of California citizens and municipalities in the tidelands. Consequently, it would seem improper to apply in this proceeding the California rule which was devised for application in substantially different circumstances.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 89, Original

STATE OF CALIFORNIA, EX REL.,
STATE LANDS COMMISSION, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON CROSS-MOTIONS FOR JUDGMENT

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Pursuant to Rules 9.5 and 9.6 of the Rules of this Court, the Solicitor General, on behalf of the United States, moves for leave to file a supplemental brief before argument.

In accordance with Orders entered November 30 and December 7, 1981, this case is before the Court on cross-motions for judgment. The same Orders provided for simultaneous opening and reply briefs by the parties, which have been filed. The Reply Brief of California raises new or substantially new arguments which, because of the simultaneous briefing schedule, the United States has not had an opportunity to answer. In the interest of orderly presentation of the case, it seems desirable that a written response to those arguments now be submitted by the United States. This would permit the Court to focus on the critical issues, as more narrowly defined, before oral argument.

Specifically, we seek leave to reply to the following contentions of the State of California, raised or elaborated in its Reply Brief:

(1) That, independently of the Submerged Lands Act (43 U.S.C. 1301 et seq.), lands wholly submerged beneath the open sea when California entered the Union, which became uplands before 1953, are sovereign lands of the State in accordance with State law property rules, because at some intervening time the lands were tidelands;

(2) That accretions to the mainland caused by natural wave and tidal action deflected by artificial works are "made lands" within the meaning of Section 2(a)(3) of the Submerged Lands Act, 43 U.S.C. 1301(a)(3);

(3) That such accretions to reserved lands of the United States are not encompassed by Section 5 of the Submerged Lands Act, 43 U.S.C. 1313, because State law does not recognize the added lands as natural accretion inuring to the upland water.

If leave is granted, the United States would undertake to file its supplemental brief on or before March 15, 1981, and would limit that submission to twenty printed pages.

Counsel for the State of California has authorized us to state that he has no objection to the granting of this motion.

Respectfully submitted.

REX E. LEE
Solicitor General

FEBRUARY 1982